

1. **Weldegebriel (Migration) [2018] AATA 1072 (9 March 2018)**

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DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Ms Saba Weldegebriel
VISA APPLICANT:	Mr Nahom Resom Gebrehiwet
CASE NUMBER:	1730296
DIBP REFERENCE(S):	OSF2015/075422 OSF2015075422
MEMBER:	Ann Brandon-Baker
DATE:	9 March 2018
PLACE OF DECISION:	Brisbane
DECISION:	The Tribunal affirms the decision not to grant the applicant a Child (Migrant) (Class AH) visa.

Statement made on 09 March 2018 at 10:21am

CATCHWORDS

Child (Migrant) (Class AH) visa – Subclass 117 (Orphan Relative) - Public Interest Criterion 4020 – Incorrect date on birth certificate – Compassionate or compelling circumstances to waive requirement

LEGISLATION

4. *Migration Act 1958*, ss 5(1), 65
Migration Regulations 1994, Schedule 2 cl 117.223, Schedule 4 Item 4020; r 1.03

CASES

Arora v MIBP (2016) FCAFC 35
Batra v MIAC (2013) FCA 274
Kaur v MIBP (2017) FCAFC 184
Plaintiff M64/2015 v MIBP (2015) HCA 50
Trivedi v MIBP (2014) FCAFC 42

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

5. This is an application for review of a decision made by a delegate of the Minister for Immigration on 6 October 2017 to refuse to grant the applicant a Child (Migrant) (Class AH) visa under s.65 of the *Migration Act 1958* (the Act).
6. The applicant applied for the visa on 21 July 2015. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl.117.223 of Schedule 2 to the Migration Regulations 1994 (the Regulations) because the applicant provided a bogus document in relation to his application for the visa.
7. The review applicant wrote to the Tribunal on 8 March 2018 advising that she was happy for the Tribunal to make a decision based on the papers without the need for a hearing. The review applicant suggested that she would be seeking the intervention of the Minister.
8. The review applicant was represented in relation to the review by her registered migration agent.
9. For the following reasons, the Tribunal has concluded that decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

10. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.117.223 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
11. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

HAS THE APPLICANT GIVEN, OR CAUSED TO BE GIVEN A BOGUS DOCUMENT, OR INFORMATION THAT IS FALSE OR MISLEADING IN MATERIAL PARTICULAR?

12. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
13. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
14. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
15. The delegate found that the applicant had provided a false birth certificate which showed his date of birth as 22 September 1998. However, in a previous [visa application] the applicant had provided a birth certificate showing his date of birth as 22 September 1996.
16. The parties were given a natural justice letter and asked to comment on this discrepancy in the birth certificates and respond to the delegate's view that the document was bogus.
17. In response to that letter the review applicant claimed that as far as she knew the documents were correct and she did not check the dates. The delegate found that the visa applicant did not meet the requirements of PIC4020(1)(a) and went on to consider if there were any compelling circumstances affecting the interests of Australia or any compelling or compassionate circumstances affecting an Australian citizen or permanent resident that would justify the grant of this visa. There was no information provided to the delegate indicating that any such compelling or compassionate circumstances exist in the applicant's case.
18. As the Tribunal has no further information before it upon which to form a different view, the Tribunal is therefore not satisfied that the applicant meets PIC 4020(1).

SHOULD THE REQUIREMENTS OF PIC 4020(1) OR (2) BE WAIVED?

19. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.
20. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v*

MIBP [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.

21. The Tribunal has no information before it indicating that any such compelling or compassionate circumstances exist in the applicant's case.
22. The Tribunal is not satisfied, therefore, that the requirements of PIC 4020(1) be waived.

CONCLUSION

23. On the basis of the above, the applicant does not satisfy PIC 4020 for the purposes of cl.117.223.
24. There is no evidence before the Tribunal that the applicant meets any of the criteria for any other subclass within the class of visa sought.

DECISION

25. The Tribunal affirms the decision not to grant the applicant a Child (Migrant) (Class AH) visa.

A B Baker
Senior Member

ATTACHMENT

MIGRATION REGULATIONS 1994

SCHEDULE 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

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MIGRATION ACT 1958

S.5 INTERPRETATION

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

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